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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

ADAM RICHARDS, et al.,

Plaintiffs,

v.

ROB BONTA, et al.,

Defendants.

Case No.: 8:23-cv-02413 JVS (KESx)

**PLAINTIFFS' MEMORANDUM OF
POINTS AND AUTHORITIES IN
OPPOSITION TO MOTION TO
DISMISS AMENDED COMPLAINT**

Hearing Date: October 7, 2024
Hearing Time: 1:30 p.m.
Courtroom: 10C
Judge: Hon. James V. Selna

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I. DEFENDANTS CANNOT MEET THE STANDARD FOR DISMISSAL

Dismissal under Federal Rule of Civil Procedure 12(b)(6) is very rare. Indeed, it is “only the *extraordinary* case in which dismissal is proper” for failure to state a claim. *United States v. City of Redwood City*, 640 F.2d 963, 966 (9th Cir. 1981) (emphasis added). A court may dismiss a claim only if the complaint: (1) lacks a cognizable legal theory; or (2) fails to contain sufficient facts to support a cognizable legal claim. *Robertson v. Dean Witter Reynolds, Inc.*, 749 F.2d 530, 534 (9th Cir. 1984). To survive a Rule 12(b)(6) motion to dismiss, then, “a complaint generally must satisfy only the minimal notice pleading requirements of Rule 8(a)(2).” *Porter v. Jones*, 319 F.3d 483, 494 (9th Cir. 2003). That is, a plaintiff need provide just a short and plain statement showing that she is entitled to relief. Fed. R. Civ. P. 8(a)(2). What is more, courts must view the complaint “in the light most favorable to the plaintiff, taking all allegations as true, and drawing all reasonable inferences from the complaint in [her] favor.” *Doe v. United States*, 419 F.3d 1058, 1062 (9th Cir. 2005).

In the context of a claim for violation of First Amendment rights based on a regulation that chills speech, such challenges are given the most leeway, especially at the pleading stage. *See Ariz. Right to Life Political Action Comm. v. Bayless*, 320 F.3d 1002, 1006 (9th Cir. 2003). Standing and injury are sufficiently pleaded by showing that the statute caused or will cause self-censorship. *See id.*; *Libertarian Party of Los Angeles County v. Bowen*, 709 F.3d 867, 870 (9th Cir. 2013). As described below, the Amended Complaint and its supporting declarations describe how Plaintiffs, other licensees, and their customers will self-censor due to a regulated omnipresent government recording of their words not necessarily confined to or related to a firearms transaction.

A plaintiff states a viable Fourth Amendment violation as to the overbreadth of a regulatory search when a plaintiff alleges that an electronic recording of conversations on private premises was conducted prior to a warrant being sought or

1 issued. *See, e.g., United States v. U.S. Dist. Court for Eastern Dist. of Mich.,*
2 *Southern Div.*, 407 U.S. 297, 315, 320 (1972). A viable Fourth Amendment
3 violation is pleaded when a plaintiff alleges that the government takes a third-
4 party's electronic information without a warrant where there is at least some
5 expectation of privacy, however diminished. *See Carpenter v. United States*, 585
6 U.S. 296, 314-15 (2018). Plaintiffs have alleged that the state has turned their
7 homes and businesses into de facto 24-hour audiovisual recording centers, which
8 conversations of both Plaintiffs and their customers can be obtained even by
9 litigants alleging some nexus between what might have been recorded and some
10 pending civil action. *But see* Cal. Code Civ. P. § 1985.3 (normally third-party
11 recordings and information are protected from disclosure to litigants by a notice-
12 and-objection process afforded to the affected persons; no such safeguard exists for
13 customers of licensees subject to Penal Code section 26806). Nor have Defendants
14 met their burden for warrantless searches (surveillance) of even highly regulated
15 industries under *City of Los Angeles v. Patel*, 576 U.S. 409 (2015), and *New York v.*
16 *Burger*, 482 U.S. 691 (1987).

17 A takings claim need only allege that the result of a regulation was the
18 physical invasion of the plaintiff's property. *See Cedar Point Nursery v. Hassid*,
19 594 U.S. 139, 149 (2021). Plaintiffs have alleged that they are obligated to install
20 and maintain on their properties a video and audio monitoring system for the sole
21 benefit of the government.

22 **II. PLAINTIFFS' FIRST AMENDMENT CLAIM EXCEEDS MERE "PLAUSIBILITY"**

23 **A. Section 26806 Chills Protected Speech and Association.**

24 Plaintiffs' First Amendment claim, alleging the chilling of speech in both
25 businesses and homes, is more than "plausible." Section 26806's overbreadth
26 strikes at the very core of the constitutional rights of speech and association in
27 one's own home. Defendants extol the virtues of Section 26806's in-store and in-
28 home surveillance mandate, claiming it "assists law enforcement in ... *detering*"

1 all manner of potential crimes, including “straw purchases.” Defs.’ Mem. of P. &
2 A. in Supp. of Defs.’ Mot. to Dismiss Am. Compl. (“Mot.”) at 2:9-10, ECF No. 41
3 (emphasis added). Defendants thus contemplate Section 26806 deterring (*i.e.*,
4 *chilling*)¹ at least *some* speech,² yet simultaneously insist that Section 26806 chills
5 *no* speech or association whatsoever. *See* Mot. at 4:22 (claiming Section 26806
6 does not “even regulat[e] speech”). This theory is incoherent.

7 First, Defendants posit that Section 26806 cannot possibly chill speech or
8 association because it does not *expressly* “target,” “proscribe,” or “punish” with
9 “consequences.” Mot. at 5:6, 4:13, 5:7, 6:8. But the Ninth Circuit has made clear
10 that “the government may chill speech” not just by “threatening or causing ...
11 harm” or by “prohibiting” conduct, but also by “*intercepting*” communications and
12 even “conducting *covert surveillance*” of constitutionally protected conduct. *Ariz.*
13 *Students’ Ass’n v. Ariz. Bd. of Regents*, 824 F.3d 858, 868 (9th Cir. 2016)
14 (emphasis added):

15 Both the Supreme Court and [the Ninth Circuit] have recognized a
16 wide variety of conduct that impermissibly interferes with speech. For
17 example, the government may chill speech by threatening or causing
18 pecuniary harm, ... withholding a license, right, or benefit, ...
19 prohibiting the solicitation of charitable donations, ... detaining or
intercepting mail, ... or conducting covert surveillance of church
services.... Importantly, the test for determining whether the alleged
retaliatory conduct chills free speech is objective; it asks whether the
retaliatory acts “‘would lead ordinary student[s] ... in the plaintiffs’
position’ to refrain from protected speech.”

20 *Ariz. Students’ Ass’n*, 824 F.3d at 868 (citations omitted); *see also* Pls.’

21 Reply in Supp. of Mot. for Prelim. Inj. at 2:4-4:15, ECF No. 22. The Ninth
22 Circuit has recognized that “congregants are chilled from participating in
23 worship activities[] when they refuse to attend church services because they

24 ¹ Compare “*Deter*,” Merriam Webster, [https://www.merriam-](https://www.merriam-webster.com/dictionary/deter)
25 [webster.com/dictionary/deter](https://www.merriam-webster.com/dictionary/deter) (last visited Aug. 30, 2024) (“to ... discourage, or
26 prevent”), with “*Chill*,” Merriam Webster, [https://www.merriam-](https://www.merriam-webster.com/thesaurus/chill#thesaurus-entry-3-3)
27 [webster.com/thesaurus/chill#thesaurus-entry-3-3](https://www.merriam-webster.com/thesaurus/chill#thesaurus-entry-3-3) (last visited Aug. 30, 2024) (“to
discourage”).

28 ² Indeed, it is difficult to conduct a straw purchase without *speaking* to a
store clerk.

1 fear the government is spying on them and taping their every utterance....”
2 *Presbyterian Church*, 870 F.2d at 522. If the mere possibility of *covert*
3 surveillance causes congregants reasonably to alter their conduct, then
4 Section 26806’s *overt* surveillance of Plaintiffs’ utterances (even within their
5 own homes) is even more stifling.³

6 Because Section 26806 places patrons and proprietors on notice of perpetual,
7 government-accessible surveillance, it “prevents Plaintiff Clark from freely
8 communicating with FFLs as to ongoing legal and legislative initiatives for fear of
9 being recorded by the government,” which “chill[s] his ability to speak freely for
10 fear of retribution by the government.” Am. Compl. ¶ 12; Decl. of Gerald Clark in
11 Supp. of Compl., ¶ 7, ECF No. 1-4; *see also* Decl. of Jesse Harris in Supp. of
12 Compl., ¶ 13, ECF No. 1-5. A member of Plaintiff GOA, Matthew Gene Peterson-
13 Haywood, can no longer have private talks, have friends stay the night, discuss his
14 political views, perform his job duties, discuss private health matters, or even
15 practice his religion *within his own home* without being exposed to pervasive
16 surveillance. Decl. of Matthew Gene Peterson-Haywood in Supp. of Mot. for
17 Prelim. Inj., ¶¶ 14-31, ECF No. 27-1. For purposes of a motion to dismiss, these
18 allegations must be accepted as true.

19 Defendants offer a red herring that Section 26806 “imposes no consequences
20 for making ... statements,” so Plaintiffs’ fears of chilled speech cannot be
21 “objectively reasonable.” Mot. at 6:7-8 & 5:9; *see also id.* at 5:22-23 (calling

22
23 ³ In *Presbyterian Church*, the Ninth Circuit held that “[t]he alleged effect on
24 the *churches* is not a mere subjective chill on their worship activities; it is a
25 concrete, demonstrable decrease in attendance at those worship activities. The
26 injury to the churches is ‘distinct and palpable.’” *Presbyterian Church*, 870 F.2d at
27 522. *Cf.* Am. Compl. ¶ 10 (surveillance requirements “will force [plaintiff] to
28 remove FFL business from his home”); *id.* at ¶ 11 (“cost of implementing ... and
customer disapproval may force [plaintiff] to have to give up his home FFL
business”); *id.* at ¶ 13 (“requirements ... are cost prohibitive” and “customers will
not want to be recorded [] and would cause him to have to stop being an FFL”).

1 Plaintiffs’ fear of having their most private conversations subject to “pervasive
2 governmental ... recordings ... objectively *unreasonable*”). But the absence of
3 express punishment is not a characteristic of a “chilling effect” (*see* Pls.’ Reply in
4 Supp. of Mot. for Prelim. Inj. at 2:4-19, ECF No. 22), and the absence of
5 enumerated “consequences” did not prevent the Ninth Circuit from finding “a
6 cognizable injury” when government agents simply wore “‘body bugs’ and
7 surreptitiously recorded church services.” *Presbyterian Church*, 870 F.2d at 520,
8 523.⁴ *See* Compl. ¶ 343 n.39.

9 Nor does Defendants’ appeal to the purported “tight[] limits [on] the use or
10 release of the recordings” (Mot. at 5:13; *see also id.* at 6:28, “the State cannot use
11 or disclose any information from the recordings”) have any basis in fact, as Section
12 26806(b) plainly allows unfettered access by government “agent[s]” at any time to
13 ensure “compliance,” places no restriction on what information may be copied or
14 seized, and establishes no limit whatsoever on the subsequent use of that
15 information. In fact, Section 26806(b) on its face places restrictions *only on*
16 *licensees, not the government.*

17 Defendants close with the non sequitur that Section 26806 “does not
18 ‘compel[] disclosure of affiliation with groups engaged in advocacy’” because the
19 state’s ability to use recordings is purportedly “limited” and individuals “cho[o]se
20 to appear in person to conduct a commercial transaction” subject to regulation and
21 paperwork. Mot. at 6:23-24, 7:1, 7:2-3. But even if that were so, Section 26806 also
22 records the activities of those who visit a gun store and *do not purchase* a firearm,
23 and sweeps up speech *unrelated* to gun purchases. Nor is it any answer to say that
24 individuals simply could stop patronizing gun stores if they do not wish their
25 affiliations in protected groups like GOC and CRPA to be disclosed. Certainly, the

26
27 ⁴ Defendants claim that other industries are required to have surveillance
28 “such as banking, gambling, and cannabis” (Mot. at 1:10-11), but none of these
industries involves enumerated rights.

1 Supreme Court never suggested that members of the NAACP should discontinue
2 their protected activities to avoid disclosure of their identities. *See NAACP v.*
3 *Alabama ex rel. Patterson*, 357 U.S. 449 (1958).

4 **B. Section 26806 Eviscerates the Established Right to Speak**
5 **Anonymously.**

6 Section 26806 eviscerates the settled “right to speak anonymously” (*Doe v.*
7 *2themart.com Inc.*, 140 F. Supp. 2d 1088, 1092 (W.D. Wash. 2001)), which courts
8 uniformly recognize as “an aspect of the freedom of speech protected by the First
9 Amendment” (*McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 343 (1995)), to a
10 “so-called right.” Mot. at 7:7 (emphasis added). Disputing the *merits* of Plaintiffs’
11 claim (Mot. at 7:9, “no merit to the allegation”), Defendants offer the straw man
12 that Section 26806 “forbids public disclosure” and, thus, Plaintiffs somehow remain
13 anonymous vis-à-vis *the government*. *Id.* at 7:8. These arguments only distract from
14 the fact that Section 26806 unmask Plaintiffs and all manner of gun store patrons
15 to the state, not the public generally. *See* Am. Compl. ¶¶ 92-93. And again, Section
16 26806(b) only limits access *by dealers*, not the government or even third parties
17 alleging some relevance of the recordings to a civil dispute (e.g., a former employee
18 alleging that evidence of harassment or discrimination is contained in the recorded
19 conversations).

20 Defendants’ focus on those participating in business transactions in gun
21 stores is similarly unavailing. *See* Mot. at 7:12-21 (“engaging in a face-to-face
22 business interaction,” “identity verification is a feature of firearm purchases,”
23 “interest in anonymous commercial transactions”). As Plaintiffs explained, Section
24 26806 reaches far more protected conduct than mere transactions. *See, e.g.,* Am.
25 Compl. ¶ 13 (“speech about gun control, [political] campaign[s], and the current
26 politics of California”), ¶ 15 (“confidential conversations with customers regarding
27 their self-defense needs as well as collecting confidential and personal
28 information”). Defendants make no attempt to grapple with *these* allegations.

1 **III. PLAINTIFFS HAVE ADEQUATELY ALLEGED SECTION 26806’S VIOLATION OF**
2 **THE FOURTH AMENDMENT**

3 Prior litigation dealt superficially with the Fourth Amendment issues by
4 focusing on whether this law is an administrative search under the “highly regulated
5 industry” exception and whether it violates any “reasonable expectation of privacy”
6 under *Katz v. United States*, 389 U.S. 347 (1967). But Section 26806 does more
7 than violate a reasonable expectation of privacy. It is self-contradictory in that it
8 frustrates its own purpose (gathering relevant and **admissible** data for enforcement
9 and possible prosecution) by violating the Fourth Amendment. It is also a
10 constitutionally flawed attempt to nudge FFLs from merely doing business in a
11 highly regulated industry, to being actual law enforcement surveillance agents.

12 The Defendants cannot even make up their minds whether Section 26806
13 constitutes a general warrant. They claim with a bracketed omission that the law
14 “does not grant ‘enforcement officials blanket authority’ to engage in ‘pervasive[]’
15 surveillance, nor does it allow an officer to conduct ‘an unrestrained search for
16 evidence of criminal activity’ in violation of the Fourth Amendment.” Mot. at
17 10:16-19. This is a departure from Defendants’ prior Motion to Dismiss, which
18 previously denied that Section 26806 allowed officials to “engage in ‘pervasive,
19 *unparticularized* surveillance,’” First Mot. at 18, ECF No. 31 (emphasis added).
20 This constitutes an admission by the Defendants that Section 26806’s constant
21 surveillance mandate is indeed unparticularized as to any sort of suspected criminal
22 activity – i.e., the essence of a general warrant. It is also the reason the Fourth
23 Amendment was written and ratified in the first place.

24 In a reverse application of *Printz v. United States*, 521 U.S. 898 (1997),
25 Section 26806 commandeers FFLs into becoming state actors, thus violating the
26 reasonableness standard of the Fourth Amendment. The coercive nature of the
27 transactions associated with enumerated rights that must (and can only) take place
28 through FFLs, coupled with the policy of compelling FFLs to surveil their

1 customers, at their own gun stores and retail spaces, transforms the FFL into a state-
2 actor surveillance agent. This violates the Fourth Amendment.

3 A. The Sheer Overbreadth of Section 26806 Is an Especially Egregious
4 Violation of the Fourth Amendment Rights of Home FFLs.

5 Defendants posit that Plaintiffs' Fourth Amendment claim "fails as a matter
6 of law" because dealers already operate in a so-called "closely regulated industry
7 subject to extensive federal, state, and local regulations and licensing schemes and
8 in which there is a diminished expectation of privacy." Mot. at 8:1-5. Defendants
9 then list a number of existing licensing requirements at the "federal, state, and
10 local" levels, *id.* at 8:13-9:12, but none of the requirements listed remotely
11 resembles Section 26806's mass-surveillance mandate. It would seem that, under
12 Defendants' logic, California could justify warrantless, unfettered, and continuous
13 access to Plaintiffs' computers and cellular phones, on the theory that this merely is
14 an "alternate manifestation" of the "longstanding requirements for recording and
15 tracking dealer and purchaser identifying information for firearms transactions." *Id.*
16 at 4:26, 6:16-17. Defendants offer no limiting principle as to how far they may go
17 under the "closely regulated industry" exception, but that the compelled 24/7
18 audiovisual surveillance of private *homes* does not go *too* far. *Id.* at 9:15.

19 Indeed, after listing existing licensing requirements, Defendants simply
20 reiterate, in conclusory fashion, that Section 26806 is "a permissible regulation"
21 because the industry has "little reasonable expectation of privacy." Mot. at 9:22-23.
22 At last elaborating their theory, Defendants claim Section 26806 "does not allow
23 government agents to 'obtain[] information by physically intruding on a
24 constitutionally protected area,' or infringe[] upon a 'reasonable expectation of
25 privacy.'" *Id.* at 9:25-27 (cleaned up). Yet the home is the *quintessential*
26 "constitutionally protected area." *Florida v. Jardines*, 569 U.S. 1, 6 (2013). The
27 purportedly narrow exception on which Defendants rely does not permit any and all
28 intrusions the state sees fit to impose. Rather, in order to be "reasonable," a

1 warrantless administrative search of a closely regulated industry “must be
2 specifically authorized by statute, and the parameters of any exception to the search
3 warrant requirement must be found in the statute.” *Taylor v. Va. Alcoholic*
4 *Beverage Control Auth.*, 827 S.E.2d 15, 25 (Va. Ct. App. 2019) (citing *United*
5 *States v. Biswell*, 406 U.S. 311, 315 (1972)).

6 Defendants simply insist, without any valid rationale, that “[i]n-home dealers
7 are no exception.” Mot. at 10:10. But Defendants make no attempt to reconcile their
8 position with the U.S. Supreme Court’s repeated observation that, “when it comes
9 to the Fourth Amendment, the home is first among equals. At the Amendment’s
10 ‘very core’ stands ‘the right of a man to retreat into his own home and there be free
11 from unreasonable governmental intrusion.’ This right would be of little practical
12 value if the State’s agents could stand in a home’s porch or side garden and trawl
13 for evidence with impunity; the right to retreat would be significantly diminished if
14 the police could enter a man’s property to observe his repose from just outside the
15 front window.” *Jardines*, 569 U.S. at 6 (citation omitted). So too would the right be
16 of “little practical value” if the State simply could compel a man’s surveillance of
17 himself, for the State’s subsequent access. *Id.*

18 And while courts have held that statutes may authorize warrantless
19 administrative searches, these searches remain susceptible to overbreadth
20 challenges if they sweep too far. *See Rush v. Obledo*, 756 F.2d 713, 719 (9th Cir.
21 1985). Indeed, in striking down a California statute authorizing warrantless
22 inspections of *home-based* daycares, the Ninth Circuit found the “statutes
23 authorizing such searches [we]re overbroad—permitting general searches of any
24 home providing care and supervision **at any time of the day or night**—and thus
25 invalid unless sufficiently limited by the current regulations so as to preclude
26 general searches.” *Id.* at 721 (emphasis added). Observing that a “family day care
27 home is a business **only when** children cared for from other families for
28 compensation are present **and at all other times is a private residence**,” *id.*

1 (emphasis added), the Ninth Circuit all but foreclosed Defendants’ instant motion
2 seeking dismissal of Plaintiffs’ Fourth Amendment claim. Section 26806 subjects
3 home-based dealers to searches “at any time of the day or night”—in fact, *at all*
4 *times*—because surveillance must be continuous and uninterrupted.⁵ *Id.*

5 Section 26806 is hopelessly overbroad for all FFLs, but it is especially
6 egregious in its intrusion into the home-based FFL at all hours of the day and night,
7 regardless of business activity.

8 B. Use of the “Highly Regulated Industry” Exception Must Still Be
9 Reasonable Under the Fourth Amendment for Both Home-FFLs and
10 Brick & Mortar FFLs.

11 FFLs are one of only four highly regulated industries that qualify for the
12 “highly regulated industry” exception to the warrant requirement. *City of Los*
13 *Angeles v. Patel*, 576 U.S. 409, 424 (2015). *Patel* made clear that *New York v.*
14 *Burger*, 482 U.S. 691 (1987), still controls the reasonableness of government
15 conduct under that exception. The three *Burger* factors that must still be satisfied by
16 the government are: “(1) ‘[T]here must be a ‘substantial’ government interest that
17 informs the regulatory scheme pursuant to which the inspection is made’; (2) ‘the
18 warrantless inspections must be ‘necessary’ to further [the] regulatory scheme’; and
19 (3) ‘the statute’s inspection program, in terms of the certainty and regularity of its
20 application, [must] provid[e] a constitutionally adequate substitute for a warrant.’ ”
21 *Patel*, 576 U.S. at 426 (*quoting Burger*, 482 U.S. at 402-03).

22 This Court made an earlier finding that Section 26806 probably fulfills the
23 substantial government interest: public safety. Plaintiffs disagree, but note that
24 question is a proper question for trial versus resolution on a motion to dismiss.

25 ⁵ Defendants claim that Section 26806 “requires monitoring only in certain
26 public spaces....” Mot. at 10:20-21. But even if one could argue that the residence
27 of a home-based dealer, often doing business by private invitation only, is somehow
28 a “public space” during operating hours, the same cannot be said when the home is
not being used for business purposes.

1 Nevertheless, Plaintiffs contend that the federally mandated collection of data for
2 ensuring lawful transactions and maintaining such data to trace firearms that are the
3 subject of a criminal investigation, already fulfills the “necessity” prong of *Burger*,
4 thus addressing that alleged government interest. This includes the paper records
5 and/or the collection and maintenance of enhanced (electronic/digitized) records,
6 use of photo ID, and execution of sales documents under penalty of perjury that is
7 already imposed on all FFLs.

8 This “surveillance” and storage of sales data, though authorized by federal
9 law, is also circumscribed by federal law. *See* Congressional Research Service
10 Reports, Statutory Federal Gun Registry Prohibitions and ATF Record Retention
11 Requirement, IF 12057 (Feb, 5, 2024).⁶ To expand that surveillance and storage of
12 data to the scheme codified by Section 26806, California must meet its burden for
13 what is still a warrantless search of people doing business at a gun store. *See*
14 *Horton v. California*, 496 U.S. 128, 133 n.4 (1990); *Katz v. United States*, 389 U.S.
15 347, 357 (1967). At a minimum, the other two prongs of the *Burger* test—
16 “necessity” and “adequate substitute for a warrant”—are where the challenged law
17 fails to comport with the Constitution.

18 C. Section 26806 Turns FFLs into Perpetual Government Surveillance
19 Agents, Immediately Implicating the Fourth Amendment’s Warrant
20 Requirement Regardless of When Law Enforcement Eventually Seeks a
21 Warrant to Retrieve the Surveillance.

22 Section 26806(a)(1)-(7) compels the gun store owner to install digital
23 video/audio surveillance equipment and regulates the use of that equipment.
24 Section 26806(b) forbids the licensee to “use, share, allow access, or otherwise
25 release recordings” except: (1) to an agent of the government conducting an
26 inspection of the licensee’s premises to ensure compliance with the law, but only if

27 ⁶ <https://crsreports.congress.gov/product/pdf/IF/IF12057> (last visited
28 September 4, 2024).

1 a **warrant** or court order **would not** generally be required for that access (emphasis
2 added); (2) only pursuant to **search warrant** or other court order (emphasis added);
3 and (3) only pursuant to insurance claims or as part of a civil discovery process.
4 Thus, California admits that the Fourth Amendment still requires a warrant to
5 access the data (face and voice recordings) collected under Section 26806. So why
6 isn't a warrant required for the government-mandated actor (the FFL) to **collect and**
7 **record** the data?

8 *1. Section 26806 Turns the Licensee into a Government Actor.*

9 FFLs are considered quasi-government agents in certain law enforcement
10 contexts. *United States v. Tallmadge*, 829 F.2d 767, 774 (9th Cir. 1987)
11 (affirmative defense of entrapment by estoppel available to defendant because
12 dealer is acting as agent of the government in that circumstance). Would that
13 government agent classification extend to a Fourth Amendment analysis (*e.g.*, in a
14 motion to suppress) when a licensee turns over recordings of video or audio
15 surveillance of his own store, when voluntarily using his own equipment to help
16 prosecute a robbery, theft, or other crime? No, regardless of whether there is a
17 warrant or court order. *See United States v. Attson*, 900 F.2d 1427, 1433 (9th Cir.
18 1990) (doctor drawing blood for medical reasons was not intending to aid the
19 government's investigative or administrative capacity).

20 Section 26806 short-circuits this non-law-enforcement rationale for
21 collecting data by compelling an FFL to conduct 24/7 surveillance of their
22 customers for the government on pain of penalty of law, including the loss of their
23 license to do business in California. Whether a private party is engaged in state
24 action is a highly specific and fact-centered question. But not under Section 26806.
25 The challenged law codifies the interdependence of the licensee and government
26 officials under all of the tests—joint action, symbiotic relationship, and public
27 function—outlined in *Brunette v. Humane Society of Ventura County*, 294 F.3d
28 1205, 1210-14 (9th Cir. 2002). This statute makes an FFL a government agent

1 collecting audio and video surveillance of his customers for the state's use.

2 As noted above, subdivisions (b)(1) and (b)(2) of the statute may still require
3 warrants for seizing or accessing the audio/video recordings compelled by Section
4 26806. This is an admission by the State that the data gathered during retail
5 transactions is intrusive under the Fourth Amendment, and therefore subject to a
6 warrant. But under this statute, the constitutional violation occurs when the
7 government actor—in this case, the statutorily obliged FFL—engages in the
8 initial surveillance and recording. That is because the use of electronic devices to
9 capture conversations is still a search under the Fourth Amendment. *Berger v. New*
10 *York*, 388 U.S. 41, 51 (1967). Moreover, this electronic surveillance is not a search
11 of the licensees' store or the federally mandated business records under the "highly
12 regulated business" exception; it is a search that is conducted by the licensee as a
13 government agent, recording the conduct of every retail customer who enters his
14 place of business—24 hours a day, 7 days a week, 365 days a year.

15 Under *Burger*, the Fourth Amendment mandates that "the statute's
16 inspection program, in terms of the certainty and regularity of its application,
17 [must] provid[e] a constitutionally adequate substitute for a warrant." *Patel*, 576
18 U.S. at 426 (quoting *Burger*, 482 U.S. at 702-03). There is no such "adequate
19 substitute for a warrant" that safeguards the Fourth Amendment rights of an FFL
20 and his customers in the panopticon mandated by Section 26806.

21 An obvious test? Ask any neutral and detached magistrate if they would
22 approve a warrant for 24/7 audio and video surveillance, 365 days a year, of all
23 people seeking to buy liquor, used auto parts, or those engaged in the business of
24 mining. What concrete and particularized evidence that would support probable
25 cause to believe a crime is (or will be) committed just because someone enters a
26 retail establishment shopping for regulated products? Liquor stores, auto junk
27 yards, mining enterprises, and firearm dealers are the only four industries that
28 qualify for the "highly regulated business" exception to the warrant (or adequate

1 substitute for warrant) requirement. *Patel*, 576 U.S. at 424.

2 But those businesses—and their customers—are still protected under the
3 *Burger* factors. *See generally Craig v. Boren*, 429 U.S. 190 (1976) (gender-based
4 equal protection challenge to state regulation on liquor sales could be brought by
5 vendor on behalf of affected customers, and vendor’s “highly regulated business”
6 affected neither standing nor relief).

7 The interposition of a neutral and detached magistrate, based upon probable
8 cause to believe a crime has been (or will be) committed, backed up with evidence,
9 are the constitutionally minimal requirements necessary to conduct the search
10 and/or surveillance of every retail customer (whether they buy a gun or not) by the
11 FFL dealer acting as a government agent.

12 2. *The Signage Required by Section 26806(c) Does Not Make the*
13 *Warrantless Surveillance or Search Constitutional.*

14 *Carpenter v. United States*, 585 U.S. 296 (2018), made clear that unavoidable
15 exposure to ubiquitous electronic surveillance and the recordation of personal data,
16 conversations, and other information is still protected against government intrusion
17 under the Fourth Amendment. In that case, the Supreme Court “decline[d] to grant
18 the state unrestricted access to a wireless carrier’s database of physical location
19 information. In light of the deeply revealing nature of CSLI, its depth, breadth, and
20 comprehensive reach, and **the inescapable and automatic nature of its collection,**
21 **the fact that such information is gathered by a third party does not make it**
22 **any less deserving of Fourth Amendment protection.”** *Id.* at 320 (emphasis
23 added). The Court went on to find the government’s acquisition of the cell phone
24 records—records that are far less intrusive than facial images and recordings of
25 individual conversations—is still a search under the Fourth Amendment.

26 As Justice Brandeis explained in his famous dissent, the Court is
27 obligated—as “[s]ubtler and more far-reaching means of invading
28 privacy have become available to the Government”—to ensure that the
“progress of science” does not erode Fourth Amendment protections.

1 [Olmstead v. United States, 277 U.S. 438, 473–474 (1928)]. Here the
2 progress of science has afforded law enforcement a powerful new tool
3 to carry out its important responsibilities. At the same time, this tool
4 risks Government encroachment of the sort the Framers, “after
consulting the lessons of history,” drafted the Fourth Amendment to
prevent.

5 *Carpenter* at 320 (quoting *United States v. Di Re*, 332 U.S. 581, 595 (1948)).

6 California must satisfy all the *Burger* factors for the collection and storage of
7 the face and voice impressions of gun buyers, exercising their Second Amendment
8 rights, without also requiring them to waive their Fourth Amendment rights. “[T]he
9 warrantless inspections must be ‘necessary’ to further [the] regulatory scheme”; and
10 that “the statute’s inspection program, in terms of the certainty and regularity of its
11 application, provid[e] a constitutionally adequate substitute for a warrant.” *Burger*,
12 482 U.S. at 702-03.

13 The “necessity test” is a “means versus ends” analysis, susceptible to the
14 same overbreadth analysis in *Carpenter*. E.g., why all non-transactional
15 conversations be recorded, when actual sales are already subject to requirements of
16 photo ID, execution of sales documents under penalty of perjury, and storage by the
17 FFL of such records?

18 The “warrant substitute” test in *Burger* specifically mandates heightened
19 judicial scrutiny of Section 26806 to ensure that the government is acting within the
20 bounds of the Constitution. California’s burden under the *Burger* factors becomes
21 impossible when one considers that essentially all firearm sales and transfers must
22 be conducted through licensed dealers. Cal. Penal Code §§ 26500-90 & 27545.

23 Notwithstanding the government’s nebulous (but ultimately unenforceable)
24 concession that Section 26806 will not be enforced at gun shows, that means that
25 home FFLs, gun stores, and gun shows are the only places people can exercise their
26 enumerated right to acquire firearms. See, e.g., *Jackson v. City & Cnty. of San*
27 *Francisco*, 746 F.3d 953 (9th Cir. 2014); see also *Andrews v. State*, 50 Tenn. 165,
28

1 178 (1871) (“The right to keep arms, necessarily involves the right to purchase
2 them, to keep them in a state of efficiency for use, and to purchase and provide
3 ammunition suitable for such arms, and to keep them in repair”) (cited favorably in
4 *District of Columbia v. Heller*, 554 U.S. 570, 614 (2008)).

5 This is why the signage requirement of Section 26806(c) does not cure the
6 defect of making the licensed gun dealer a government surveillance agent. The
7 doctrine being violated, though not labelled as such in *Carpenter*, is known as an
8 “unconstitutional condition.” See generally Comment, *Another Look at*
9 *Unconstitutional Conditions*, 117 U. Pa. L. Rev. 144 (1968). The issue was
10 explicitly addressed in *Simmons v. United States*, 390 U.S. 377, 394 (1968)
11 (defendant cannot be compelled to waive Fifth Amendment rights to invoke Fourth
12 Amendment rights); see also *Kaur v. Maryland*, 141 S. Ct. 5, 6 (2020) (Sotomayor,
13 J., concurring) (quoting *Simmons*: “[W]e find it intolerable that one constitutional
14 right should have to be surrendered in order to assert another.”).

15 California’s regime of requiring nearly all civilian gun sales and transfers to
16 be conducted under the surveillance and recordation by conscripted state actors
17 imposes an unconstitutional condition on the exercise of an enumerated right. For
18 Plaintiffs to exercise their right to acquire firearms, they must waive their Fourth
19 Amendment right by subjecting themselves to constant and unnecessary warrantless
20 surveillance. This forfeiture of one right for another is intolerable under the
21 unconstitutional condition doctrine affirmed in *Simmons*.

22 Like the impermissible warrantless collection of cell-site information in
23 *Carpenter v. United States*, Section 26806 creates an audio and video recording
24 scheme that results in an “inescapable and automatic” collection of private
25 conversations and associations. *Carpenter*, 585 U.S. at 320.

26 Plaintiffs have adequately alleged that Section 26806 inflicts a similar
27 constitutional injury in its automatic collection of their private information on both
28 themselves as well as on their members and customers. The allegations supporting

1 these injuries are all that is needed to state a viable Fourth Amendment violation
2 and survive Defendant's motion to dismiss.

3 **IV. SECTION 26806 APPROPRIATES PRIVATE SPACE AND PRIVATE EQUIPMENT**
4 **SOLELY FOR GOVERNMENT USE WITHOUT COMPENSATION, IN VIOLATION**
5 **OF THE TAKINGS CLAUSE**

6 Defendants dispute whether "the [forcible] 'installation of government
7 surveillance equipment' constitutes a per se physical taking warranting
8 compensation," insisting that "[t]his claim is without merit." Mot. at 11:23-25. Of
9 course, *merits* argumentation (which, in fact, comprises the vast majority of
10 Defendant's motion) has no place in a motion to dismiss, which only "tests the
11 legal sufficiency of the claims asserted in the complaint," not their ultimate merit.
12 *Hall v. Mythical Venture, Inc.*, 2024 U.S. Dist. LEXIS 14789, at *2 (C.D. Cal. Jan.
13 26, 2024). District courts therefore discount such arguments as "premature" at the
14 motion to dismiss stage. *See, e.g., Grady Mem'l Hosp. Corp. v. Grady Baby Co. &*
15 *Apparel LLC*, 2023 U.S. Dist. LEXIS 236514, at *7 (N.D. Ga. Dec. 5, 2023). Even
16 so, Defendants' premature merits arguments fail.

17 Section 26806 imposes on licensee Plaintiffs a legal obligation to undertake
18 continuous digital video surveillance of their own private property, and to permit
19 government agents to freely enter their property at will, to access and view, at-will,
20 that perpetual digital video surveillance. This is not a merely prohibitory restriction,
21 but rather a mandatory action that Plaintiffs must take at their own considerable
22 expense. Moreover, Plaintiffs cannot use or enjoy the benefits of the expensive
23 system; only the government or third-party litigants may access the recordings. Cal.
24 Penal Code § 26806(b). In essence, Plaintiffs are forced to install and house
25 equipment in their private buildings and dwellings, and also to pay for that
26 permanent physical recording system *that they are not allowed to use for their own*
27 *purposes*, and all so that they can be surveilled by the government. *See Cedar Point*
28 *Nursery v. Hassid*, 594 U.S. 139 (2021) ("[w]henver a regulation results in a
physical appropriation of property, a per se taking has occurred" and just

1 compensation must be paid.); *see also id.* at 2073 (“a permanent physical
2 occupation constitutes a per se taking regardless whether it results in only a trivial
3 economic loss” and “without regard to whether the action achieves an important
4 public benefit or has only minimal economic impact on the owner.”).

5 And while regulatory mandates are nothing new in regulated industries, the
6 law here is entirely unlike mere commercial regulations (fill out this form, keep this
7 record). Section 26806 commandeers business owners—including those who
8 conduct business out of their home—to implement a perpetual government
9 surveillance scheme without any form of compensation. This regulatory scheme is
10 akin to that of *Boise Cascade Corp. v. United States*, 296 F.3d 1339 (Fed. Cir.
11 2002) except that there, no surveillance of private conversations was involved. *Id.*
12 at 1355 (permanent physical taking when the government “sunk concrete wells on
13 ... property to monitor groundwater pollution from a nearby superfund site,” and
14 thereafter government “workers ... entered to ... maintain[] and monitor them....
15 The permanency of the wells and the quasi-permanent right of entry provided to the
16 government workers who monitored and maintained them led us to apply the per se
17 takings theory of *Loretto*.”). Section 26806’s surveillance mandate is worse than
18 *Boise Cascade Corp.*; here, the State effectively is forcing Plaintiffs to pay for and
19 build the “wells” on their property and instructing Plaintiffs never to access them
20 except to ensure they are functioning appropriately or to provide access to the
21 government.

22 Defendants respond by claiming that operators of highly regulated industries
23 have a diminished “expectation of compensation under the Fifth Amendment.”
24 Mot. at 12:2. In support, Defendants claim that “firearms dealing” is “an area
25 voluntarily entered into and one which, from the start, is subject to pervasive
26 Government control.” Mot. at 12:12-14, 18 (citing *Mitchell Arms v. United States*, 7
27 F.3d 212, 216 (Fed. Cir. 1993). Thus, Defendants claim, Plaintiffs cannot exclude a
28 government surveillance system from their gun stores (including their private

1 homes). But *Mitchell Arms* does not stand for the proposition that gun stores – real
2 property – lose their private nature and are subject to whatever controls the state
3 wishes to impose, merely because they are put to a certain commercial use. Rather,
4 the court was discussing “the governmentally controlled arena of firearms
5 importation,” finding that “the expectation of selling [] assault rifles ... could not be
6 said to be a property right....” *Id.* at 216. That decision in no way stands for the
7 proposition that a gun store owner must allow his physical property to be controlled
8 and used by the state to house its surveillance apparatuses.

9 Next, Defendants claim that *Loretto v. Teleprompter Manhattan CATF Corp.*,
10 458 U.S. 419 (1982) is inapplicable because here Plaintiffs have no “historically
11 rooted expectation of compensation....” Mot. at 12:22-2 (citing *California Hous.*
12 *Sec., Inc. v. United States*, 959 F.2d 955, 958 (Fed. Cir. 1992)). But *California*
13 *Housing Securities, Inc. v. United States* involved a savings and loan association
14 that subjected itself to an existing “regulatory system,” and “did not possess the
15 most valued property right ... the right to exclude others, at the time of the alleged
16 taking.” In other words, the entity was well aware of the “historically rooted
17 expectation[] that the federal government would take possession of its premises and
18 holdings as conservator or receiver” if certain regulatory conditions were not met.
19 *Id.* Here, by contrast, Section 26806 creates an entirely new and costly regime that
20 was never in place when Plaintiffs entered the marketplace as dealers. Moreover,
21 the FDIC insurance provided the savings and loan at least some theoretical benefit,
22 whereas here, Section 26806’s surveillance system’s entire purpose is for use by the
23 state. But most importantly, even though subject to temporary administrative
24 inspections by federal and state entities (*see* Mot. at 13:19-20) to inspect firearms
25 and paperwork, gun dealers otherwise have always the right to exclude state agents
26 from conducting 24/7 surveillance of everything that occurs within their stores.
27 Section 26806 upends that historical right, and *Loretto* controls here.

28 Defendants further argue for dismissal on the basis that Plaintiffs have

1 purportedly failed to “allege that Section 26806 will impose a significant or
2 prohibitive” enough expense on them. Mot. at 14:3-21. But the significance of the
3 cost is a quintessential *question of fact* inappropriate for dismissal at the pleading
4 stage. Plaintiffs have sufficiently alleged that they are facing not only a financial
5 burden from the requirement, but a significant one, with some alleging they would
6 have to cease their business because of it. *See* Am. Compl. ¶¶ 11, 13, 159, 165; *see*
7 *also id.* at ¶¶ 215-44 (demonstrating that the total cost of implementation to a gun
8 store would be around \$17,000); *cf.* Mot. at 14:18-19 (claiming Plaintiffs’
9 Complaint “lacks any fact-based showing”).

10 Plaintiffs’ allegations of the costs of Section 26806 causing retailers to exit
11 the market are neither theoretical nor implausible, but they are demonstrably
12 prohibitive even this early into the law’s implementation. Big 5 Sporting Goods,
13 one of California’s largest retail firearms licensees prior to 2024, ceased sales of
14 rifles and shotguns at all of its California locations in 2024 in lieu of incurring the
15 cost of compliance with Section 26806. *See* Big 5 Sporting Goods Corp., Annual
16 Report (Form 10-K) (Feb. 28, 2024) at 17,
17 [https://www.sec.gov/ix?doc=/Archives/edgar/data/1156388/000095017024021829/](https://www.sec.gov/ix?doc=/Archives/edgar/data/1156388/000095017024021829/bgv-20231231.htm)
18 [bgfv-20231231.htm](https://www.sec.gov/ix?doc=/Archives/edgar/data/1156388/000095017024021829/bgv-20231231.htm) (last visited June 5, 2024) (“Regulations which took effect
19 January 1, 2024 contributed to the discontinuation of firearm sales in our California
20 markets.”). Regardless of the unassailable fact that dealers already are exiting the
21 market due to the costs of compliance with Section 26806, Plaintiffs’ plausible
22 allegations of incurring significant cost are all that is required and must be accepted
23 as true at this stage of proceedings.

24 **V. CONCLUSION**

25 A motion to dismiss is a vehicle for testing the sufficiency of the pleadings.
26 Rather than use that vehicle for its intended purpose, Defendants have hijacked it to
27 variously claim that “allegation[s]” and even whole “claim[s]” are simply “without
28 merit.” Mot. at 7:9, 11:25. These quintessential *merits* arguments have no place in a

1 Rule 12(b)(6) motion, and this Court should reject them on their face and without
2 further consideration. It is black-letter law, within this Circuit and without, that
3 asking “the Court to wade into the merits of Plaintiffs’ claims ... is inappropriate at
4 the motion to dismiss stage” and indeed “premature.” *Standard Furniture Mfg. Co.*
5 *v. LF Prods. Pte. Ltd.*, 2017 U.S. Dist. LEXIS 174293, at *13 (C.D. Cal. June 13,
6 2017); *Davis v. Magna Int’l of Am., Inc.*, 2021 U.S. Dist. LEXIS 62106, at *19
7 (E.D. Mich. Mar. 31, 2021); *see also Manigault v. Astrue*, 2012 U.S. Dist. LEXIS
8 194708, at *6 (N.D. Ga. June 15, 2012); *CSX Transp., Inc. v. Norfolk S. Ry. Co.*,
9 2019 U.S. Dist. LEXIS 161339, at *27 (E.D. Va. Sept. 9, 2019).

10 But even if this Court were to consider Defendants’ premature merits
11 arguments, they fail. Indeed, Section 26806 necessarily chills the exercise of First
12 Amendment rights, as the Ninth Circuit already has held that knowledge of even the
13 *possibility* of *covert* surveillance will reasonably alter an individual’s words and
14 conduct. Section 26806 likewise abridges the individual right to speak
15 anonymously, and Defendants’ “public disclosure” obscurantism simply fails to
16 address the substance of the right – anonymity *from the government* itself, which
17 reserves free access to Section 26806 recordings on its own terms.

18 Defendants’ Fourth Amendment merits argument is similarly unavailing, as
19 they simply invoke the “closely regulated industry” exception as a license to
20 commit any and all constitutional abuses – no matter how unprecedented,
21 pervasive, or Orwellian. How a constitutionally protected industry cannot expect
22 privacy from a *novel* mass-surveillance scheme, Defendants never say. Ultimately,
23 Defendants concede that Section 26806 is unparticularized to any sort of criminal
24 activity – a feature of British searches known to the Founders as the “general
25 warrant.”

26 Finally, Section 26806 commands licensees – even homeowners – to
27 purchase at their own cost, install, and maintain for the State’s benefit a
28 surveillance infrastructure which they themselves cannot even access. If this sort of

1 physical intrusion – and the demonstrably prohibitive, business-ending costs it
2 entails – do not constitute a “taking” within the meaning of the Fifth Amendment, it
3 is difficult to imagine what would.

4 For the foregoing reasons, Defendants’ motion to dismiss should be denied.

5 Dated: September 5, 2024

MICHEL & ASSOCIATES, P.C.

6 s/ Joshua Robert Dale

7 Joshua Robert Dale

8 Attorneys for Plaintiffs Adam Richards,
9 Jeffrey Vandermeulen, Gerald Clark, Jesse
10 Harris, On Target Indoor Shooting Range,
11 LLC, Gaalswyk Enterprises, Inc. (D/B/A
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California, Inc., Gun Owners of America, Inc.,
Gun Owners Foundation, and California Rifle
& Pistol Association, Incorporated

12 Dated: September 5, 2024

LAW OFFICES OF DONALD KILMER, APC

13 s/ Donald Kilmer

14 Donald Kilmer

15 Attorney for Plaintiff The Second Amendment
Foundation

ATTESTATION OF E-FILED SIGNATURES

I, Joshua Robert Dale, am the ECF User whose ID and password are being used to file this PLAINTIFFS' MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO MOTION TO DISMISS AMENDED COMPLAINT. In compliance with Central District of California L.R. 5-4.3.4, I attest that all signatories are registered CM/ECF filers and have concurred in this filing.

Dated: September 5, 2024

s/ Joshua Robert Dale
Joshua Robert Dale

CERTIFICATE OF COMPLIANCE

The undersigned, counsel of record for Plaintiffs Adam Richards, Jeffrey Vandermeulen, Gerald Clark, Jesse Harris, On Target Indoor Shooting Range, LLC, Gaalswyk Enterprises, Inc. (D/B/A Smokin' Barrel Firearms), Gun Owners of California, Inc., Gun Owners of America, Inc., Gun Owners Foundation, and California Rifle & Pistol Association, Incorporated, certifies that this brief contains 6,965 words, which complies with the word limit of Central District of California L.R. 11-6.1.

Dated: September 5, 2024

s/ Joshua Robert Dale
Joshua Robert Dale

CERTIFICATE OF SERVICE
IN THE UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Case Name: *Richards, et al. v. Newsom, et al.*
Case No.: 8:23-cv-02413 JVS (KESx)

IT IS HEREBY CERTIFIED THAT:

I, the undersigned, am a citizen of the United States and am at least eighteen years of age. My business address is 180 East Ocean Boulevard, Suite 200, Long Beach, California 90802.

I am not a party to the above-entitled action. I have caused service of:

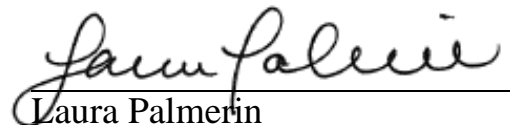
**PLAINTIFFS' MEMORANDUM OF POINTS AND AUTHORITIES IN
OPPOSITION TO MOTION TO DISMISS AMENDED COMPLAINT**

on the following party by electronically filing the foregoing with the Clerk of the District Court using its ECF System, which electronically notifies them:

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I declare under penalty of perjury that the foregoing is true and correct.

Executed September 5, 2024.



Laura Palmerin